

CEPS COMMENTARY

*Thinking ahead for Europe*

The Timoshenko Case and the Rule of Law in Ukraine

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On 20 December 2010 the Ukrainian prosecutor charged former Prime Minister, Yulia Timoshenko, with abuse of office, and her trial began on 27 June in Kiev. The case is of course highly controversial within Ukraine, and also now has international aspects. Ms Timoshenko has asked the European Court of Human Rights to determine whether the charges are politically motivated, at a time when Ukraine occupies the position of chairman-in-office of the Council of Europe. The US and the EU have both expressed concern about the apparently political motivation of the charges. The Parliamentary Assembly of the Council of Europe is concerned by the case: the leader of its Christian Democrat faction declared on 26 May that the “politically motivated prosecution of the opposition, particularly Timoshenko, is not consistent with European standards...”. The European Parliament adopted on 9 June a resolution on the case of Yulia Timoshenko and other former members of the Ukrainian government (including former Interior Minister Yuri Lutsenko). This resolution expressed concern “about the increased selective prosecution of figures from the political opposition in Ukraine”

The international and European ramifications of these cases may increase over the next half year as the trials proceed in parallel with an important agenda for EU-Ukraine affairs. The EU will host a high-profile Eastern Partnership summit towards the end of September, at which Ukraine will inevitably be the most prominent partner state by virtue of its size and political significance. In addition the EU and Ukraine are seeking to bring to a conclusion an Association Agreement, including as part of it a Deep and Comprehensive Free Trade Agreement (DCFTA), with December appearing to be the target date for signing this Treaty. It should be noted that such treaties have on the EU side to be ratified by both the European Parliament and all 27 national parliaments. Moreover all such agreements now include a so-called ‘human rights clause’, which generally uses language like “respect for democratic principles and fundamental human rights constitutes an essential element of this agreement”. This means that if this clause is not respected, there are grounds for a very serious response, such as suspension of the agreement.

Some Ukrainian politicians are already expressing their indignation at international ‘interference’ in these affairs. For example Vadym Kolesnichenko, deputy chairman of the Party of the Regions’ faction in the Ukrainian parliament, published on 20 July a press release complaining about double standards, when many countries in the West have seen cases of high-ranking public figures subject to prosecutions (Dominique Strauss-Kahn, Jacques Chirac, Silvio Berlusconi and others). However,

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President Yanukovich has declared Ukraine's ambition for integration with the EU, which will mean much 'interference', as member states of the EU know full well.

The indictment is about Ms Timoshenko having concluded a gas deal with Moscow early in 2009 shortly after an interruption of Russian gas supplies, which led to crisis conditions in parts of the EU. There are other allegations of over-spending for public procurements for ambulances and anti-flu vaccines and for mis-spending Kyoto credits on pensions. It is impossible for the outside observer to have a view on allegations such as those concerning over-spending. However the indictment of abuse of office in doing a gas deal with Moscow merits a more precise comment. The period of the Yushchenko-Timoshenko governance of Ukraine from 2005 to 2010 was chronically dysfunctional at the constitutional (especially inter-institutional) level, with open conflict between President and Prime Minister, and continuous frictions with the Parliament, resulting in a high degree of paralysis in legislation and policy-making, and continuous confusion over interpretations of the requirements of the constitution. At the same time the securing of gas supplies into Ukraine both for its own use and for transit through to the EU was and still is a matter of strategic, even existential importance for the economies of both Ukraine and the EU. Deals had to be made, even while the country's system of governing institutions was clearly not functioning properly. The gas deal made by the Prime Minister is reported to have been without the authorisation of the Cabinet of Ministers, while it was the subject of explicit attempts by President Yushchenko to obstruct it. The Prime Minister argued that the President was trying to favour the interests of the (highly non-transparent) Rosukrenergo trading company.

The technical argument being used by the prosecutor is apparently that the Prime Minister's signature of her 'instruction' or 'directive', which could itself be a licit measure on her personal authority, was supplemented by placing the official stamp of the Cabinet of Ministers by her signature. The legal case seems to hang upon whether this stamp was merely authenticating the Prime Minister's signature, or implying incorrectly that that it was a decision of the Cabinet (source: www.ukrainedemocracy.com/?p0=266). The indictment is saying that the mistakes of procedure here amounted to a serious crime.

On the matter of gas deals and constitutionality, President Yanukovich's own record in office may be noted, including the agreement he made with Moscow within days of taking office, which traded a short-term discount of the gas price for a long-term extension of the lease of the port of Sebastapol to the Russian Black Sea fleet. The gas deal was lacking in transparency both as regards its effective economic value and as regards who were to be the ultimate beneficiaries as between the state, various gas trading entities, and various gas-consuming industrial corporations, several of which have been supporters of Yanukovich's election and presidency. While Ms Timoshenko is indicted for taking a procedural shortcut, President Yanukovich shows himself to be a champion of executive shortcuts even on matters of such strategic significance as the long-term lease of the Sebastapol naval base to Russia.

The wheels of Ukrainian justice have now to turn, with possible recourse to the European Court of Human Rights if a case of relevance to it needs to be made. Kiev (the government and judiciary) should ensure that the legal proceedings to be both legally correct and politically fair. There is time to do this, before the various rendezvous with the EU between September and December. Much hangs upon this, first of all for the international reputation of the Yanukovich administration. The case will be followed with great attention, and notably the European Parliament which will have in due course to ratify the proposed Association Agreement. The Parliament is capable legally of stopping the Agreement from entering into force, if the criticisms of the case mount in volume and credibility. Escalation of the controversy has not so far reached the point of this becoming a prospect: best make sure that it does not.